United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1052

To be argued by
PHYLIS SKLOOT BAMBERGER

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellant -v.- TOMMY ROBERTS, Appellee.	Docket No. 75-1052

BRIEF FOR APPELLEE

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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QUESTIONS PRESENTED

1. Whether the Sixth Amendment required dismissal of this indictment.

2. Whether the Fifth Amendment required dismissal of this indictment.

PRELIMINARY STATEMENT

This appeal by the Government is from an order of the United States District Court for the Eastern District of New York (The Honorable John F. Dooling) entered on January 20, 1975, dismissing an indictment.

The Legal Aid Society, Federal Defender Services Unit, was continued as counsel on appeal pursuant to the Criminal Justice Act.

STATEMENT OF FACTS

Tommy Roberts was arrested on May 25, 1973. Just before that date he had become 25 years old. A complaint was filed charging him with possession of stolen mail. On October 2, 1973, an indictment was filed charging this crime, and the case was assigned to Judge Travia. At that time, Judge Travia had completed pre-trial proceedings in a complicated Federal Housing Administration (F.H.A.) case, and was about to begin the long trial which lasted for nine months, until July, 1974. United States v. Bernstein, 72 Cr. 587.

On the same day, Alonzo Smith and Henry Smith were indicted on related mail theft charges. These cases were also assigned to Judge Travia.

On October 15, 1973, Mr. Roberts entered a plea of not guilty and the Judge adjourned the case for twenty days for preparation of pre-trial motions.

Similar proceedings took place on the same date in both Smith cases (73 Cr. 882, 73 Cr. 883).

At the time of the arraignment on October 15, 1973, it had been agreed that Mr. Roberts would be permitted to plead to a misdemeanor to cover the charges in the indictment, but that, at the request of the Government, this would not occur until disposition of the pending indictment against the Smiths.*

The Government filed a notice of readiness for trial in this case on October 23, 1973, and in the Smith cases on October 25, and October 26, 1973.

On May 21, 1974, Mr. Roberts became 26 years old. Nothing happened in Roberts' case until November 13, 1974, when, after transfer of the case from Judge Travia to Judge Dooling, Judge Dooling held a pre-trial conference. He then notified all counsel that the case was set for trial on February 3, 1975.** Additional conferences were held on November 20, 1974, and December 10, 1974. According to the

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* This information was revealed in the motion to dismiss the indictment and the Government's response filed much later in the case.

** I am advised that on November 13, 1974, a motion to dismiss for failure to prosecute was made by defense counsel. The minutes of these proceedings were not transcribed at the time of submission of this brief, but will be available at oral argument.

docket entries, on December 10, 1974, defense counsel made an oral motion to dismiss for failure to prosecute. A written motion was filed on December 16, 1974.

At oral argument on the motion to dismiss, the prosecutor indicated that negotiations were underway for a disposition of the Smith cases, and that this disposition would include pending FHA fraud cases.

On January 20, 1975, the indictment against Roberts was dismissed.

In his opinion dismissing the indictment, Judge Dooling noted that three assistants had handled the case and stated:

> The parties are agreed that in fact a misdemeanor disposition had been agreed upon, and that it was not to take place until after the cases against the Smiths were tried or otherwise disposed of. Disposition of the Smith cases, however, was complicated by the existence of a possibility that one or both defendants might be indicted in unrelated FHA matters; the Smiths were, and are, unwilling to dispose of their pending cases unless the FHA matters have also been put behind them.
>
> (Court opinion at 2-3)

The Judge also stated:

> Judge Travia was engrossed from October, 1973 until July 5, 1974, in the trial of United States v. Bernstein, et al., 72 CR 587. He was unable to conduct other trials, but he did give attention to the other cases assigned to him on regularly scheduled motion and plea days, and exigent cases were transferred to other judges for trial where possible.
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> (Court opinion at 3)

He found that the delay "was of the Government's procurement, and was in its interest" (Opinion at 5) and was due to the Government's insistence that disposition of Mr. Roberts' case be deferred and "the more general Governmental failure to provide a tribunal to the parties:"

> The terms of disposition, once articulated, gave both parties an interest in awaiting the moment when the Smith cases could be terminated. It was, however, as between the Government and the defendant, the Government's responsibility to effect a speedy disposition of the Smith cases.
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> (Court opinion at 5)

The Court found the four-part test of Barker v. Wingo ill-suited to this case, but found that the year's delay - between Mr. Roberts' arrest and his 26th birthday - resulted in substantial prejudice by depriving the Court of jurisdiction to consider imposition of a youth offender sentence with the right to expungement of the defendant's record.

On February 1, 1975, a superceding information (73 Cr. 115) was filed against the Smiths, charging them with conspiracy to forge documents to obtain mortgage loans insured by the Federal Housing Administration. The information alleged fourteen overt acts.

On February 7, 1975, the prosecutor outlined in a letter to the Smiths' attorney the elements of a plea arrangement in which the Smiths were to be permitted to plead guilty to the information in exchange for cooperation with the Government in its investigation of fraud in Federal Housing Administration and Veterans Administration programs. On February 14,

1975, both Smiths pleaded guilty to conspiracy and all but the first overt act was stricken from the information. Sentencing date remains open.

POINT I

THE INDICTMENT WAS PROPERLY DISMISSED AS A VIOLATION OF THE SPEEDY TRIAL PROVISION OF THE SIXTH AMENDMENT.

The Government argues that the Sixth Amendment right to a speedy trial does not apply to imposition of sentence after a plea of guilty or to a proceeding which may result in a plea. The Government misleads the Court by making such an argument, for in fact, a series of precedents indicates that the Sixth Amendment applies in such instances.

In Pollard v. United States, 352 U.S. 354 (1957), the Court assumed that the speedy trial right includes the right to speedy sentence. Decisions of other federal courts make similar assumptions, with no difficulty applying the right to sentencing, even when imposed after entry of a plea. United States v. Hall, 451 F.2d 347 (2d Cir. 1971); Whaley v. United States, 394 F.2d 399, 401 (10th Cir. 1968); United States v. Tortorello, 391 F.2d 587 (2d Cir. 1968); Welsh v. United States, 348 F.2d 885 (6th Cir. 1965); Smoker v. Russell, 218 F.Supp. 899 (M.D. Pa. 1963); United States ex rel. Giovengo v. Maroney, 194 F.Supp. 154 (W.D. Pa. 1961).* Further,

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* To the extent that these cases require a prior demand or request for speedy action as a prerequisite to a remedy they have been overruled by Moore v. Arizona, 414 U.S. 25 (1974). See discussion infra at 11.

United States v. Blauner, 337 F.Supp. 1394 (S.D.N.Y. 1971), indicates that the right applies to a defendant who intends to plead guilty as part of an agreement with the Government to cooperate against co-defendants. In Blauner, the defendant requested permission to withdraw his plea of guilty after the indictment had been dismissed against his co-defendants for denial of speedy trial. Although the district judge denied the motion, he stated:

> With respect to his motion for dismissal of the indictment, he attempts to place himself in the position of those co-defendants who secured dismissal of the indictment and yet he makes no showing of prejudice by the delay. Had there been any prejudice he could have moved to dismiss the indictment prior to the time he pleaded guilty, and, assuming the Government consented, could have preserved this claim for appeal had his motion been denied.

There is good reason to apply the speedy trial rule to cases in which a defendant intends to, but has not yet entered, a plea of guilty, and to the period between a finding of guilty and the imposition of sentence. Before the plea, the defendant is literally within the terms of the right because he may change his mind or the judge may refuse to accept the plea under Rule 11 of the Federal Rules of Criminal Procedure, McCarthy v. United States, 394 U.S. 459 (1969). Prior to entry of the plea, none of the rights that are part of the trial are waived. McCarthy v. United States, supra,

394 U.S. at 461; see Boykin v. Alabama, 395 U.S. 238, 243 (1969). The waiver of trial and the rights there included come only upon entry of the plea.

Further, the defendant who intends to plead guilty suffers many of the same liabilities as a result of a delay in the proceedings as does an accused who plans to go to trial. If the plea is ultimately entered, the defendant is entitled to have the court consider imposition of concurrent sentences with any other sentence being served. Strunk v. United States, 412 U.S. 434, 437-8 (1973); Smith v. Hooey, 393 U.S. 374 (1969). Any delay in entry of the plea shortens the period of concurrency between the two sentences and consequently prejudices the defendant.

Further, the psychological and financial effects of the long-term pendency of criminal charges (See Moore v. Arizona, 414 U.S. 25, 27 (1974)) exist whether the defendant intends to plead or go to trial. From a financial standpoint, it may be necessary to have counsel throughout the entire proceeding if the negotiations that accompany the plea are continuing. There is also the need to protect a defendant against Government failure to adhere to the agreement. If the plea is not entered, the defendant may be prejudiced in the presentation of a defense at any trial that may result.*

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* Of course the public interest in disposing of cases terminated by plea and sentence is no less than in cases terminated by trial and sentence.

The Government argues that the bargain in this case between the appellee and prosecutor could be taken to imply a surrender of the right to speedy trial. Under the terms of the bargain, Mr. Roberts agreed to plead guilty to a misdemeanor in return for his cooperation with the Government. The one catch was that the entry of the plea was to be delayed until after the Smiths case was completed. Since both Mr. Roberts' case and the Smith cases were assigned to Judge Travia on October 15, 1973, the Government knew that there would be a delay in any trial of the Smith cases because of Judge Travia's involvement with United States v. Bernstein. However, there is no indication that Mr. Roberts or his lawyer had any idea that any trial in the Smith cases would not take place in the seven months between the assignment of the case to Judge Travia on October 15, 1973, and Mr. Roberts' twenty-sixth birthday on May 21, 1974. Mr. Roberts' knowledge that he would have to wait until after the Smith trial to plead is not the same thing as knowing that the Smith trial would not take place for an extended unspecified period.

Nor could Mr. Roberts or his lawyer have known that Judge Travia would fail to reassign for trial the Smith cases pursuant to the local rules of the Eastern District, Rule 4, or that he would fail to fulfill the responsibility for keeping his own calendars current under Rule 9 of the Eastern District Plan for the Prompt Disposition of Criminal Cases. United States v. Drummond, 2d Cir. Docket No. 74-2264 (February 6, 1975).

Nor does the record show that they were aware of the negotiations going on between the Government and the Smiths concerning the Smiths' possible cooperation in the Federal Housing Administration scandal and that the Government's resulting interest was a delay in the proceeding against the Smiths.

The Government argues that the light sentence under the misdemeanor plea was compensation for the loss of youth offender treatment. However, this was clearly not part of the bargain. Indeed, this cooperative defendant with no prior record might have been better off with felony conviction later expunged than a permanent misdemeanor conviction. There is no indication anywhere that Mr. Roberts made this choice, or indeed, that, in the context of this early agreement, it was even contemplated. Since entry of a plea requires knowledge of the results of the plea, including the waiver of certain rights, it is incumbent upon the Government to make the consequences of a negotiated plea clear to the accused. The Government did not do that at any point in this proceeding.

The Government also argues that, if the speedy trial right applies in plea situations, the failure of Mr. Roberts to make a motion for a speedy trial is "virtually devastating" to his claim under the Sixth Amendment. However, it is now the law that the demand-rule is rejected as a prerequisite for ultimate dismissal by a motion to dismiss. Barker

v. Wingo, supra. Moore v. Arizona, supra, goes further:

> We regard none of the four factors identified above [length of delay, reason for delay, defendant's assertion of his right, and prejudice to the defendant] as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant.
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> (414 U.S. at 27)

Thus, the question is whether in this case the failure to make a motion to dismiss was a waiver* of the right to dismissal.** Judge Dooling correctly held that, under the circumstances here, the request was not necessary for the relief.

The nature of the prejudice and the reason for the delay mandates dismissal here even without a motion for speedy disposition. Here, the delayed plea, a condition set by the Government, deprived Mr. Roberts of the opportunity to be sentenced under 18 U.S.C. §4209. This statute requires the district judge to consider whether to impose a youth offender sentence upon a person who is under 26 at the time of his conviction.*** While the Judge can impose the sentence only

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* The Moore case demonstrates that the determination of whether there has been a waiver of the speedy trial right will be based on more traditional waiver tests. See United States v. Stone, 319 F.Supp. 364, 367 (S.D.N.Y. 1970).

** While there is some authority for refusing to reverse a judgment premised on a valid fact-finding process even if the sentence is illegal, In Re Bonner, 151 U.S. 242 (1894); Bozza v. United States, 330 U.S. 160 (1947), dismissal is required here for it is the only way to cure the prejudice.

*** For purposes of the Youth Offender statute, conviction means a plea of guilty, or a verdict or finding of guilty. 18 U.S.C. §5006(h).

if he reasonably believes the person will benefit from the conditions if confinement granted under the Youth Offender sentence, he must consider that as a sentence alternative. Dorszynski v. United States, 418 U.S. 424 (1974). The delay here, precipitated by the Government's insistence on disposition of the cases in a certain order and Judge Travia's failure to reassign the case, deprived the sentencing court of jurisdiction to consider this sentencing alternative. Because the Court could not consider this alternative, Mr. Roberts was deprived of the opportunity to have the conviction expunged from his record.*

Even if Mr. Roberts could have gotten a speedy entry of his plea and imposition of sentence because Judge Travia continued to dispose of plea cases during the Bernstein trial, as far as Mr. Roberts knew, the Government opposed such timing of his proceedings. Indeed, the prior disposition of the Smith cases was a prerequisite under the plea agreement. To his knowledge, if he sought immediate disposition, the agreement was negated. As Judge Dooling found, the reason for the delay was the Government's insistence on this delayed plea and the fact that

> . . . The disposition of the Smith cases was complicated by the existence of a possibility that one or both defendants

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* The argument that there is no guarantee that Mr. Roberts would have gotten youth offender treatment is beside the point. He had the right to have the Court consider the possibility. United States v. Kaylor, 491 F.2d 1133, 1141 (2d Cir.) reversed on other grounds, - U.S. - , (August 7, 1974); United States v. Brown, 470 F.2d 285, 288 (2d Cir. 1972); United States v. Clark, 475 F.2d 240, 251 n.15 (2d Cir. 1973).

might be indicted in unrelated Federal Housing Administration matters; the Smiths were, and are, unwilling to dispose of their pending cases unless the F.H.A. matters have also been put behind them.

Judge Dooling also found that no tribunal was made available to the parties. This was due not only to Judge Travia's long engagement, but to the failure of the Judge and the Government to reassign the cases.* The failure to make the motion in light of reasons for the delay is not a waiver of the right to a speedy trial.**

The Government argues that because there was no adversary relationship between Mr. Roberts and the Government after the agreement was made, the failure of Mr. Roberts to come to the prosecutor to request a speedy disposition shows the defendant's satisfaction with the agreement regardless of the loss of his rights. However, whether the Government would have altered the agreement upon his request was unknown to Mr. Roberts. Further, the assertion by the Government that they were on the same side is fallacious. Mr. Roberts was dependent upon the Government for the handing down of the

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* The Government claims that the delay was not "deliberate" on its part. On these facts, such a claim is a misrepresentation. The delay might not have been malevolent, but, as Judge Dooling found, the plea entry was intentionally put off by the Government for its own, but apparent, reasons.

** At one point, in its brief, the Government argues that Mr. Roberts cooperation caused the delay. However, his agreement to cooperate was concluded before October 15, 1974. Whatever else the Government contemplated by way of cooperation was delayed because of the delay in the Smith trial.

misdemeanor information, and if the Government refused to file the information the case would have proceeded pursuant to the pending indictment. The Government's power to compel Mr. Roberts' compliance came through its ability to convert the charges to a misdemeanor; Mr. Roberts had no such leverage. Indeed, there are instances where the Government has refused to comply with an agreement upon its unilateral belief that there was non-compliance by the defendant. See e.g. United States v. Seiller, 74 Civ. 1595 (S.D.N.Y.), appeal pending, 2d Cir. Doc. No. 75-2002; United States v. Podell, S.D.N.Y. 73 Cr. 675 (Transcript of Jan. 9, 1975 at 116), appeal pending, 2d Cir. Docket No. 75-1019.

These circumstances demonstrate that Mr. Roberts' Sixth Amendment rights were violated and that the order below should be affirmed.

POINT II

THE INDICTMENT WAS PROPERLY DISMISSED BECAUSE THE PROCEDURE VIOLATED DUE PROCESS.

As a matter of due process, the indictment was properly dismissed. United States v. Marion, 404 U.S. 307 (1971). Indeed, Judge Dooling made it clear that he thought the proceeding had been unfair.

The Government argues that under Marion the delay in this case is too short to dismiss even though prejudice

accrued to Mr. Roberts. A reading of Marion, however, shows that the Supreme Court did not decide how long or short the delay need be to warrant dismissal. It only discussed application of the traditional "balancing test" applied in due process cases. See e.g., Stovall v. Denno, 388 U.S. 293, (1967). Thus, to determine if the delay warrants a finding of due process violation, the Court looks to the reason for the delay as compared with the resulting prejudice.

Here, the delay was caused, as Judge Dooling found, by the Government's insistence that the Smith cases be tried first while it refused to use availabe methods to provide a forum for the trial. The reason for the refusal to permit the plea to be entered prior to the Smiths' trial is nowhere articulated by the Government on this record. It also appears from the record that the Government was negotiating for the assistance of the Smiths in the F.H.A. fraud case. This was evident from the letter of February 7, 1975, setting out the arrangement between the Smiths and the Government; from the proceedings of January 17, 1975, and from the Government's brief (FN at 4). Since the Smiths were interested in an agreement that would cover all pending and potentail charges and the Government wanted the cooperation of the Smiths in another set of cases, the evidence is clear that the Government's interest lay in delaying the trial of

the Smith cases. Thus, Mr. Roberts' case was being delayed because the Government had other interests than its speedy termination. Yet despite this attitude on the part of the Government, the record does not show that Mr. Roberts and his counsel were ever advised of the potential length of the delay and could not evaluate the effect of the delay.

The Government's own position on the appeal is an indication that the usual way of dealing with co-defendants is to permit entry of the plea and adjourning of the sentencing date. (See Government brief, FN at 4). There is no indication of the reason why the Government chose to abandon that position in this case. Further, if the Government was interested in moving up both the pleading and sentencing date, it was easy enough for them to do that by seeking a reassignment of the trial in the Smith case. Of course, the record shows that this was not in the Government's interest, and that the Government never advised the defense of this.

On balancing, there was no Government interest that overcame Mr. Robert's right to be considered for young adult offender status unless Mr. Roberts was advised of that possibility and made a deliberate choice to proceed on the agreement or to seek his sentencing rights.

Mr. Roberts properly raised his claim of due process violation after it occurred. This motion to dismiss was sufficient to present his claim factually and Judge Dooling's decision which rests, at least in part, on that ground for relief is correct.

CONCLUSION

For the above-stated reasons, the order below should be affirmed.

Respectfully submitted,

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